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2
3 UNITED STATES DISTRICT COURT
4 CENTRAL DISTRICT OF CALIFORNIA
5 WESTERN DIVISION

6 KETRINA GORDON,)
7)
8 PLAINTIFF,)
9 V.)
10 TOOTSIE ROLL INDUSTRIES, INC.,)
11 ET AL.,)
12 DEFENDANTS.) CV 17-2664-DSF (MRWX)
13) JANUARY 10, 2018
14) (9:38 A.M. TO 9:56 A.M.)
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14 DISCOVERY CONFERENCE

15 BEFORE THE HONORABLE MICHAEL R. WILNER
16 UNITED STATES MAGISTRATE JUDGE

17 APPEARANCES: SEE NEXT PAGE
18 COURT REPORTER: RECORDED; COURT SMART
19 COURTROOM DEPUTY: MEL ZAVALA
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23 PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
24 TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.
25

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8 FOR THE DEFENDANTS TOOTSIE ROLL INDUSTRIES, INC., ET AL.:

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I N D E X
CV 17-2664-DSF (MRWX) JANUARY 10, 2018
PROCEEDINGS: HEARING ON DISCOVERY MOTION

1 LOS ANGELES, CALIFORNIA; JANUARY 10, 2018; 9:38 A.M.

2 THE COURT: ALL RIGHT. LET'S CALL THE TOOTSIE ROLL
3 CASE.

4 THE CLERK: CALLING CASE NUMBER CV 17-2664-DSF(MRWX),
5 KETRINA GORDON VERSUS TOOTSIE ROLL INDUSTRIES, INC.

6 COUNSEL, PLEASE STATE YOUR APPEARANCE.

7 MR. CLARKSON: GOOD MORNING, YOUR HONOR.

8 RYAN CLARKSON APPEARING ON BEHALF OF PLAINTIFF.

9 THE COURT: MR. CLARKSON.

10 MS. SODAIFY: GOOD MORNING, YOUR HONOR.

11 BAHAR SODAIFY FOR PLAINTIFF.

12 THE COURT: MS. SODAIFY.

13 MS. SIMONSEN: GOOD MORNING, YOUR HONOR.

14 ASHLEY SIMONSEN, COVINGTON & BURLING, FOR THE

15 DEFENDANT --

16 THE COURT: MS. --

17 MS. SIMONSEN: -- TOOTSIE ROLL.

18 THE COURT: MS. SIMONSEN, GOOD MORNING TO YOU, ALL.

19 ALL RIGHT. THE MATTER IS ON FOR A DISCOVERY MOTION.

20 THIS IS A MOTION TO COMPEL DISCLOSURE OF THE IDENTITY
21 OF AN EXPERT WHO IS REFERENCED IN BOTH THE FIRST AND SECOND
22 AMENDED COMPLAINTS IN THE SLACK-FILL CASE AND THEN SOME OTHER
23 DISCOVERY REQUESTS.

24 I TOOK A LOOK AT THE PARTIES' STIPULATION AND JOINT
25 -- WELL, JOINT SUBMISSION. IT'S NEVER -- I DON'T KNOW WHY WE

1 CALL IT A STIPULATION. YOU HAVEN'T AGREED TO ANYTHING. IT'S A
2 JOINT SUBMISSION LAYING OUT THE DISCOVERY DISPUTE THAT WAS
3 FILED IN MID-DECEMBER. THERE WERE SOME SUPPORTING MATERIALS.
4 THERE WERE NO SUPPLEMENTAL BRIEFS.

5 MS. SIMONSEN, YOUR MOTION. DO YOU WANT TO BE HEARD
6 ON IT?

7 MS. SIMONSEN: YES, YOUR HONOR.

8 THE COURT: YOU USE THE LECTERN IN FEDERAL COURT.

9 MS. SIMONSEN: AND I'LL TRY TO BE BRIEF, YOUR HONOR.

10 WE'RE HERE TODAY BECAUSE THE PLAINTIFF HAS REFUSED TO
11 DISCLOSE THE IDENTITY OF AN EXPERT THAT SHE EXPRESSLY RELIED
12 UPON IN BRINGING THE CLAIMS IN THIS CASE.

13 THE COURT: RIGHT.

14 MS. SIMONSEN: AS YOU NOTED, THAT EXPERT WAS
15 IDENTIFIED IN THE FIRST AND THE SECOND AMENDED COMPLAINT.

16 THE BOTTOM LINE, YOUR HONOR, IS THAT THE PLAINTIFF
17 CANNOT USE HER EXPERT AND THAT EXPERT'S OPINIONS AND
18 CONCLUSIONS AS BOTH A SWORD AND A SHIELD.

19 SHE HAS CHOSEN TO RELY ON THE OPINIONS OF THAT EXPERT
20 IN HER PLEADINGS IN THIS CASE.

21 THE COURT: UH-HMM.

22 MS. SIMONSEN: IT IS APPARENT THAT SHE DID SO IN AN
23 EFFORT TO BOLSTER THE VIABILITY OF HER CLAIMS AND HER
24 ALLEGATIONS IN AN EFFORT TO OPPOSE THE DEFENDANT'S ORIGINAL
25 MOTION TO DISMISS.

1 AND HAVING DONE SO SHE CANNOT NOW REFUSE TO DISCLOSE
2 THE IDENTITY OF THAT EXPERT OR THE FACTUAL BASIS FOR HER OR HIS
3 CONCLUSIONS.

4 THE COURT: I WENT THROUGH YOUR PAPERS VERY CLOSELY.
5 AND I USED A COMPUTER TO SEARCH FOR ALL OF THE REFERENCES TO
6 FEDERAL RULE OF CIVIL PROCEDURE 26(B)(4)(D) IN YOUR PORTION OF
7 THE JOINT SUBMISSION. I DIDN'T SEE ANY.

8 MS. SIMONSEN: YOUR HONOR, THE LEGAL DOCTRINE AT
9 ISSUE HERE IS THE DOCTRINE THAT STATES THAT WHEN A PARTY PUTS
10 PRIVILEGED MATERIAL, WHETHER THAT'S WORK PRODUCT OR
11 ATTORNEY-CLIENT PRIVILEGE MATERIAL, AT ISSUE IN A PROCEEDING,
12 THAT MATERIAL IS THEN SUBJECT TO DISCLOSURE. AND THAT IS WHY
13 THE MANY --

14 THE COURT: UNLESS RULE 26(B)(4)(D) SAYS NOT.

15 MR. SIMONSEN: WELL, RULE 26(B)(4)(D) IS ESSENTIALLY
16 NOT -- DOES NOT APPLY IN A CASE WHERE A PARTY HAS PUT THE
17 CONCLUSIONS OF THE EXPERT -- OR IN THE CASE OF ATTORNEY-CLIENT
18 COMMUNICATIONS --

19 THE COURT: WHAT'S YOUR AUTHORITY FOR THAT?

20 MS. SIMONSEN: THE AUTHORITY ARE THE CASES THAT WE
21 CITED IN OUR BRIEF. SO, THAT WOULD BE HATAMIAN --

22 THE COURT: DID HATAMIAN DISCUSS RULE 26(B)(4)(D) IN
23 THE CONTEXT OF AN EXPERT WITNESS?

24 MS. SIMONSEN: IT DID NOT. I BELIEVE THE CASE THAT
25 WE CITE THAT DISCUSSES THE AT-ISSUE DOCTRINE SPECIFICALLY WITH

1 RESPECT TO EXPERTS -- ACTUALLY, THAT WAS, IN FACT, THE HATAMIAN
2 CASE, YES, YOUR HONOR.

3 THE COURT: OKAY. AND FROM YOUR READING OF HATAMIAN
4 COULD YOU DETERMINE WHETHER THE EXPERT UPON WHOM THE PLAINTIFF
5 RELIED IN DRAFTING THAT DOCUMENT HAD ALSO DESIGNATED THAT
6 PERSON TO BE AN EXPERT TESTIFYING AT TRIAL?

7 MS. SIMONSEN: I COULD NOT, YOUR HONOR. IT'S -- IT
8 LOOKS TO --

9 THE COURT: THAT MAKES IT A LITTLE LESS CONVINCING.

10 MS. SIMONSEN: WELL, I THINK WHAT HAPPENED WAS IN
11 THAT -- IN THAT AS I READ THE CASE THE PLAINTIFF HAD IDENTIFIED
12 WHAT THE PLAINTIFF REFERRED TO AS "INDUSTRY EXPERT A" IN THE
13 COMPLAINT. AND --

14 THE COURT: AND SEPARATELY --

15 MS. SIMONSEN: -- ASSERTED --

16 THE COURT: AND SEPARATELY SAID I'M GOING TO TURN
17 THAT OVER DOWN THE ROAD.

18 MS. SIMONSEN: AND SEPARATELY SAID THE PARTIES DO NOT
19 NEED TO DISCLOSE EXPERTS UNTIL THE TIME FOR EXPERT DISCLOSURES.

20 THE COURT: SUGGESTING THAT THAT WAS NOT A CONSULTING
21 EXPERT USED FOR PURPOSES OF ADVANCING LITIGATION BUT ACTUALLY
22 TESTIFYING AT TRIAL.

23 MS. SIMONSEN: WELL, IRREGARDLESS, YOUR HONOR,
24 WHETHER IT'S A TESTIFYING EXPERT --

25 THE COURT: RIGHT.

1 MS. SIMONSEN: -- THAT THE PARTY INTENDED TO USE
2 LATER AT TRIAL --

3 THE COURT: RIGHT.

4 MS. SIMONSEN: -- OR A CONSULTING EXPERT THAT THE
5 PARTY MERELY CONSULTED FOR PURPOSES OF BRINGING THE LAWSUIT,
6 WHEN THAT PERSON'S OPINIONS AND CONCLUSIONS ARE EXPRESSLY
7 REFERENCED IN A COMPLAINT, THEY ARE PUT AT ISSUE IN THE
8 LITIGATION AND ARE THEREFORE SUBJECT TO DISCLOSURE.

9 THE COURT: AND YOUR BEST CASE ON THAT IS?

10 MS. SIMONSEN: WELL, I THINK HATAMIAN IS THE BEST
11 CASE BECAUSE IT ADDRESSES EXPRESSLY AN EXPERT THAT IS REFERRED
12 TO IN THE COMPLAINT. BUT I THINK BROWNE AND TENET HEALTHCARE
13 EQUALLY SUPPORT THE PROPOSITION THAT WHEN WORK PRODUCT IS
14 EXPRESSLY PLACED AT ISSUE IN A COMPLAINT --

15 THE COURT: DID EITHER BROWNE OR TENET INVOLVE
16 EXPERTS?

17 MS. SIMONSEN: NO. THEY INVOLVED INVESTIGATORS
18 EMPLOYED BY THE PLAINTIFF AND IN THE CASE OF TENET HEALTHCARE
19 THE GOVERNMENT'S OWN ANALYSTS.

20 AND, SO, IN EITHER CASE WHETHER -- WHETHER
21 INVESTIGATORS, WHETHER ANALYSTS, WHETHER NON-TESTIFYING
22 CONSULTING EXPERTS --

23 THE COURT: YOU HAVE -- YOU HAVE ME ON THE
24 WORK-PRODUCT ISSUE. I GOT IT. AND THERE'S AN ANALYSIS THERE
25 ABOUT WHETHER, YOU KNOW, THEY CAN HIDE BEHIND SOMETHING. AND I

1 GET THAT.

2 BUT YOUR BIG PROBLEM IS THAT THE FEDERAL RULES OF
3 CIVIL PROCEDURE APPEAR TO DEAL WITH THIS SPECIFIC SITUATION.
4 AND WHATEVER THE PRINCIPLES ARE THAT YOU'RE RELYING ON, THE
5 RULE DICTATES SOMETHING DIFFERENT.

6 MS. SIMONSEN: WELL, PROSPECTIVELY, YOUR HONOR, RULE
7 26 DOESN'T DEAL WITH THIS SPECIFIC SITUATION BECAUSE TYPICALLY
8 A PARTY DOES NOT EXPRESSLY REFERENCE THE OPINIONS AND
9 CONCLUSIONS OF A CONSULTING EXPERT IN THEIR COMPLAINT. IT IS
10 IN THOSE CIRCUMSTANCES THAT THE PARTY IS THEN REQUIRED TO
11 DISCLOSE THE IDENTITY OF THE CONSULTING EXPERT.

12 THE COURT: OKAY. AND --

13 MS. SIMONSEN: THAT SITUATION --

14 THE COURT: AND IF YOU'RE RELYING ON TWO CASES THAT
15 DON'T TALK ABOUT EXPERTS, BROWNE AND TENET, YOU GOT A PROBLEM.
16 BECAUSE THE LITERAL TERMS OF THE RULE SAY IT DOESN'T REALLY
17 MATTER WHAT THE CIRCUMSTANCE IS. THEY CAN TALK TO WHOEVER THEY
18 WANT TO TALK TO. SIT IN A CONFERENCE ROOM. SIT IN AN OFFICE.
19 PUT SOMETHING INTO A PLEADING. YOU'RE NOT ENTITLED TO THAT
20 UNLESS THE SPECIFIC CIRCUMSTANCES SET FORTH IN THE RULE ARE
21 SATISFIED.

22 MS. SIMONSEN: WELL, AGAIN, I THINK --

23 THE COURT: AND THERE'S -- AND THERE'S AMPLE LAW ON
24 THAT.

25 MS. SIMONSEN: YOUR HONOR, RESPECTFULLY, I THINK

1 TENET HEALTHCARE AND BROWNE, ALTHOUGH THEY DIDN'T DEAL WITH
2 EXPERTS, DEMONSTRATE THE EXACT SAME PRINCIPLE THAT'S SET FORTH
3 --

4 THE COURT: OKAY.

5 MS. SIMONSEN: -- IN HATAMIAN --

6 THE COURT: GOT IT.

7 MS. SIMONSEN: -- WHICH -- WHICH DOES PERTAIN TO AN
8 EXPERT. AND --

9 THE COURT: RIGHT. BUT THERE'S NO RULE -- OKAY. I
10 GOT IT. OKAY.

11 ANYTHING ELSE?

12 MS. SIMONSEN: I WOULD SIMPLY ADD, YOUR HONOR, THAT
13 THE BASES ON WHICH PLAINTIFF TRIES TO DISTINGUISH THE CASES
14 THAT WE'VE CITED ARE -- ARE UNAVAILING.

15 AND PLAINTIFF DOES NOT TAKE ON ANY -- THE SPECIFIC
16 DOCTRINE THAT WHEN A PARTY PLACES AT ISSUE THE OPINIONS AND
17 CONCLUSIONS OF AN EXPERT, THEY ARE THEN SUBJECT TO DISCLOSURE
18 --

19 THE COURT: HOW -- LET'S ASK -- I MEAN, LET ME GET --
20 I UNDERSTAND THAT THEY HAVE ALLEGED SOMETHING BASED ON AN
21 EXPERT WHO LOOKED AT THE CANDY BOXES. I GOT IT. OKAY.

22 THAT'S NOT NECESSARILY HOW THEY'RE GOING TO PROVE
23 THIS CASE, CORRECT?

24 MS. SIMONSEN: THAT'S RIGHT, YOUR HONOR. BUT THEY
25 EXPRESSLY RELIED ON AND SUMMARIZED THOSE CONCLUSIONS IN THEIR

1 COMPLAINT IN ORDER TO SURVIVE A MOTION TO DISMISS.

2 THE COURT: WHICH THEY DID. AND YOU ANSWERED.

3 MS. SIMONSEN: BUT HAVING RELIED ON THOSE CONCLUSIONS
4 IN THEIR COMPLAINT, THEY HAVE PLACED THOSE CONCLUSIONS AND THE
5 IDENTITY OF THEIR EXPERT AT ISSUE JUST AS THEY HAVE PLACED
6 EVERYTHING ELSE IN THEIR COMPLAINT AT ISSUE IN THIS CASE.

7 AND HAVING --

8 THE COURT: PLACING IT AT ISSUE. I DON'T -- I DON'T
9 --

10 MS. SIMONSEN: PLACING SOMETHING AT ISSUE --

11 THE COURT: -- UNDERSTAND THAT.

12 MS. SIMONSEN: THAT'S LANGUAGE THAT COMES DIRECTLY
13 FROM THE HATAMIAN CASE. AND IT -- WHAT IT MEANS IS TO ALLEGE
14 SOMETHING IN SUPPORT OF YOUR CLAIMS AND THEREBY RENDER IT
15 RELEVANT TO THE PROCEEDINGS.

16 AND WHAT THE CASES WE'VE CITED -- CITED STAND FOR IS
17 THE PROPOSITION THAT THE ALLEGATIONS OF A PLAINTIFF'S COMPLAINT
18 ARE RELEVANT TO THE PROCEEDINGS, OBVIOUSLY, AND ARE THEREFORE
19 SUBJECT TO DISCOVERY BY THE DEFENDANT.

20 IN THIS CASE PLAINTIFF ELECTED TO EXPRESSLY CITE HER
21 PLAINTIFF'S -- HER -- HER EXPERT'S CONCLUSIONS AND OPINIONS.

22 THE FACT THAT SHE CONSULTED WITH HER EXPERT,
23 ORDINARILY THOSE TYPES OF THINGS ARE NOT ACTUALLY DISCLOSED IN
24 THE LITIGATION. AND THAT'S PART OF WHY THEY ARE SUBJECT TO
25 PROTECTION.

1 HERE BY CONTRAST PLAINTIFF HAS ACTUALLY DESCRIBED HER
2 CONSULTATION WITH HER EXPERT. SHE HAS REFERENCED THAT EXPERT'S
3 PRO- --

4 THE COURT: I KNOW. I READ -- I READ THE COMPLAINT.
5 I GOT IT.

6 MS. SIMONSEN: AND --

7 THE COURT: YOUR REQUEST MAKES VERY LITTLE SENSE TO
8 ME GIVEN THE CLEAR STATEMENT OF THE RULE.

9 THE LAW YOU CITED DOESN'T REALLY MOVE THE NEEDLE,
10 PARTICULARLY GIVEN THAT THE FACTS ARE ENTIRELY DIFFERENT.

11 NOW, I DO HAVE AN ISSUE, MR. CLARKSON -- I'LL GET YOU
12 AT THE LECTERN.

13 DO YOU NEED TO BE HEARD FURTHER ON THIS?

14 MR. CLARKSON: NO, YOUR HONOR.

15 THE COURT: OKAY. SO, YOU'VE GOT THE EXPERT YOU
16 TALKED WITH IN PUTTING TOGETHER YOUR COMPLAINT TO SURVIVE RULE
17 11, RIGHT? -- BASICALLY.

18 MR. CLARKSON: WELL, THE INTENT WASN'T TO SURVIVE
19 RULE 11. WE THINK THAT THE -- THE ALLEGATIONS -- THE
20 ALLEGATIONS REGARDING REFERENCES TO THE CONSULTING EXPERT WE
21 BELIEVE WERE INCONSEQUENTIAL TO THE COURT'S RULING ON THE RULE
22 12 MOTION.

23 THE COURT: WELL --

24 MR. CLARKSON: BUT --

25 THE COURT: -- EVEN IF IT WAS FUNDAMENTAL, THIS IS

1 DISCOVERY WITH AN EYE TOWARD TRIAL.

2 MR. CLARKSON: THAT'S CORRECT, YOUR HONOR.

3 THE COURT: OKAY. SO, AT SOME POINT YOU'VE GOT
4 ANOTHER EXPERT.

5 MR. CLARKSON: WE DO, YOUR HONOR.

6 THE COURT: OKAY. AND YOU'RE NOT TURNING OVER THAT
7 NAME.

8 MR. CLARKSON: I -- THAT NAME HASN'T BEEN REQUESTED.
9 BUT WE ARE HAPPY TO TURN OVER THAT NAME. IN FACT, WE'RE GOING
10 TO BE SUBMITTING A DECLARATION ON BEHALF OF OUR PACKAGING
11 ENGINEER THAT IS RETAINED, TESTIFYING AND WILL BE DESIGNATED.

12 THE TIME FOR DESIGNATION ISN'T UNTIL APRIL 30, 2018.
13 BUT --

14 THE COURT: THAT'S THE -- THAT'S THE LAST DAY.

15 MR. CLARKSON: CORRECT. CORRECT.

16 AS I --

17 THE COURT: BECAUSE, I MEAN, ONE ARGUMENT -- ONE
18 ARGUMENT I DIDN'T HEAR FROM TOOTSIE ROLL IS, HEY, WE HAVE TO GO
19 OUT AND FIND OUR OWN PACKAGING EXPERT. JUST TELL US WHO YOUR
20 PERSON WAS THAT YOU CONSULTED WITH SO WE DON'T TRIP OVER SOME
21 SORT OF CONFLICT ISSUE OR ANYTHING LIKE THAT. AND YOU HAVEN'T
22 TOLD THEM EITHER NAME.

23 MR. CLARKSON: YES, YOUR HONOR.

24 IT HASN'T BEEN -- THE ANSWER IS IT HASN'T BEEN
25 REQUESTED. IT -- WE'VE COMMUNICATED TO DEFENDANT THAT IT WILL

1 BE --

2 THE COURT: SO -- SO -- SO -- SO, THE DEFENSE --

3 MR. CLARKSON: -- DISCLOSED --

4 THE COURT: -- ONLY ASKED FOR THE NAME OF THE EXPERT
5 INVOLVED IN THE DRAFTING OF THE AMENDED COMPLAINT.

6 AND HASN'T ASKED FOR THE NEXT EXPERT?

7 MR. CLARKSON: THAT'S CORRECT, YOUR HONOR.

8 THE COURT: MS. SIMONSEN, DO YOU WANT TO KNOW WHO
9 THEIR OTHER EXPERT IS?

10 MS. SIMONSEN: YOUR HONOR, EVENTUALLY WHEN THE TIME
11 COMES TO DISCLOSE THE --

12 THE COURT: OH, YOU DON'T WANT IT TODAY? OKAY.

13 MS. SIMONSEN: I MEAN, I'M HAPPY TO TAKE IT TODAY,
14 YOUR HONOR.

15 THE COURT: YOU'RE --

16 MS. SIMONSEN: BUT THE REASON THAT WE ARE MOVING --

17 THE COURT: I'M NOT GOING TO -- I'M NOT GOING TO
18 FORCE ANYBODY --

19 MS. SIMONSEN: BUT --

20 THE COURT: OKAY.

21 MS. SIMONSEN: BUT JUST TO BE CLEAR, THE REASON THAT
22 WE'RE NOT --

23 THE COURT: YOU HAVE TO STAND UP IN FEDERAL COURT.

24 MS. SIMONSEN: WOULD YOU LIKE ME TO APPROACH THE
25 PODIUM, YOUR HONOR?

1 THE COURT: IF YOU WANT TO BE RECORDED, YEAH.

2 MS. SIMONSEN: YOUR HONOR, THE REASON WE HAVEN'T
3 MOVED FOR DISCLOSURE OF THE EXPERT THEY INTEND TO RELY ON IS
4 BECAUSE THAT EXPERT'S OPINIONS WE KNOW THAT WE WILL -- THERE
5 WILL COME A TIME WHEN WE WILL GET DISCOVERY INTO THAT.

6 THE COURT: OKAY.

7 MS. SIMONSEN: FOR CURRENT PURPOSES WHAT WE'RE
8 INTERESTED IN, AND I THINK IT'S IMPORTANT THAT YOUR HONOR
9 REFERENCED RULE 11, BECAUSE RULE 11 IS ONE OF THE PRINCIPLES
10 THAT ANIMATES THE PROPOSITION THAT A DEFENDANT IS ENTITLED TO
11 DISCOVERY OF THE ALLEGATIONS IN A COMPLAINT IN ORDER TO
12 UNDERSTAND WHETHER A PLAINTIFF ACTUALLY HAD A BASIS FOR THOSE
13 ALLEGATIONS.

14 AND IN THIS CASE ALL WE KNOW IS THAT PLAINTIFF HAS
15 REFERRED TO CONSULTATION WITH A PURPORTED EXPERT --

16 THE COURT: UH-HUH.

17 MS. SIMONSEN: -- ABOUT THE SNACK BOXES IN THESE
18 CASES. WHILE PLAINTIFF'S COUNSEL HAS FILED AT LEAST FIVE --

19 THE COURT: AM I SUPPOSED -- AM I SUPPOSED TO CALL IT
20 SNACK AS OPPOSED TO CANDY. DID I MAKE -- DID I STEP ON
21 SOMETHING THERE? I DON'T WANT TO --

22 MS. SIMONSEN: NO, YOU CAN CALL --

23 THE COURT: I DON'T WANT TO OFFEND MY GOOD FRIENDS AT
24 --

25 MS. SIMONSEN: -- IT'S CANDY. IT'S --

1 THE COURT: BECAUSE I'M A JUNIOR MINTS FAN. WE
2 ALREADY HAD THIS DISCUSSION.

3 MS. SIMONSEN: RIGHT.

4 BUT, YOUR HONOR, PLAINTIFF'S COUNSEL HAS FILED FIVE
5 OTHER LAWSUITS CONTAINING NEARLY IDENTICAL ALLEGATIONS TO THOSE
6 IN THIS CASE INCLUDING THE ALLEGATIONS ABOUT CONSULTATION WITH
7 A PURPORTED EXPERT.

8 NOW, THOSE ALLEGATIONS THAT THIS EXPERT CONFIRMED
9 PLAINTIFF'S CONTENTIONS --

10 THE COURT: YEP.

11 MS. SIMONSEN: -- THAT THE SLACK-FILL WAS
12 NONFUNCTIONAL, THAT IT DIDN'T PROTECT THE CANDY, THAT NONE OF
13 THE -- THAT SLACK-FILL WASN'T NECESSARY TO ACCOMMODATE PRODUCT
14 SETTLING. THAT IT WASN'T NECESSARY TO ACCOMMODATE THE MACHINES
15 USED TO ENCLOSE THE CONTENTS.

16 THOSE ARE IMPORTANT AND SPECIFIC FACTS THAT WERE
17 ALLEGED IN THE COMPLAINT --

18 THE COURT: THAT THEY BETTER BE ABLE TO PROVE BY THE
19 TIME OF TRIAL. I GOT IT.

20 MS. SIMONSEN: BUT, YOUR HONOR, THEY --

21 THE COURT: AND THESE -- THESE ARE -- THESE ARE NOT
22 PERCIPIENT WITNESSES. THESE ARE NOT THE CONFIDENTIAL
23 WITNESSES. THESE ARE NOT PEOPLE FOUND WHEN AN INVESTIGATOR
24 POUNDS THE PAVEMENT AND FINDS THE X EMPLOYEES. BECAUSE THOSE
25 ARE THE PEOPLE WHO WILL BE TESTIFYING AT TRIAL.

1 AND I UNDERSTAND THE BASIS FOR, YOU KNOW, THE LAW
2 THAT YOU FOUND. AND I ALSO UNDERSTAND THE OPERATION OF RULE 26
3 OR I BELIEVE I DO. AND I THINK -- I THINK, YOU KNOW, WHATEVER
4 YOU WANT TO DO TO ATTACK THE LEGITIMACY OR THE VALIDITY OF THE
5 PLEADINGS THAT TIME HAS PASSED.

6 IF WHAT YOU'RE SAYING IS THESE FOLKS ARE FILING THESE
7 CASES EVERY 15 MINUTES AND THEY DON'T REALLY HAVE A BASIS FOR
8 IT, AND, YOU KNOW, YOU CAN GET SOME TRACTION ON THAT DOWN THE
9 ROAD, SO BE IT. JUDGE FISCHER MAY DOWN THE ROAD AUTHORIZE
10 DISCOVERY IF THERE IS, FOR EXAMPLE -- AND I'M REALLY JUST
11 SPITBALLING HERE -- BUT IF THERE IS SOME SORT OF RULE 11
12 VIOLATION, IF THERE REALLY WAS NO LEGITIMATE OR REASONABLE
13 BASIS IN FACT OR LAW TO FILE THESE CASES.

14 BUT I DON'T -- I DON'T BELIEVE THE FEDERAL RULES OF
15 CIVIL PROCEDURE AUTHORIZE THIS TYPE OF DISCOVERY THAT IS
16 BACKWARD LOOKING AS TO THE PROCESS BY WHICH THIS COMPLAINT WAS
17 DRAFTED.

18 I BELIEVE THE FEDERAL RULES OF PROCEDURE ARE FOR
19 DISCOVERY -- YOU UNDERSTAND WHAT HAS BEEN PLED BECAUSE THAT WAS
20 AT ISSUE WITH JUDGE FISCHER AT THE DISMISSAL MOTIONS, RIGHT. I
21 MEAN, YOU KNOW, HAVE THEY STATED ENOUGH THAT IF PROVEN STATE A
22 CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED OR AN ISSUE
23 THAT CAN GO TO A JURY. SHE SAID THEY HAVE. AND, SO, NOW WE
24 MORE FORWARD INTO DEVELOPING THAT PROOF.

25 IF IT'S NOT THERE, COULD TOOTSIE ROLL COME BACK LATER

1 AND SAY, HEY, THIS WAS A FRIVOLOUS CASE. WE EXPENDED A LOT OF
2 ENERGY AND MONEY AND WE HAVE REASON TO BELIEVE THAT THERE NEVER
3 WAS AN EXPERT AND START PROCEEDINGS THAT WAY. OR FOR ABUSE OF
4 PROCESS OR MALICIOUS PROSECUTION, MAYBE. COME TALK -- COME
5 TALK TO ME THEN.

6 MS. SIMONSEN: AND I -- I SEE YOUR POINT, YOUR HONOR,
7 BUT THERE'S NO WAY FOR US TO KNOW -- THE QUESTION IS DID THEY
8 HAVE THE FACTS BEFORE THEY FILED THEIR COMPLAINT. THE QUESTION
9 IS NOT CAN THEY --

10 THE COURT: HOW IS THAT A QUESTION?

11 MS. SIMONSEN: EXCUSE ME?

12 THE COURT: WHAT -- HOW IS THAT A QUESTION?

13 MS. SIMONSEN: THE QUESTION FOR PURPOSES OF RULE 11,
14 YOUR HONOR, IS DID COUNSEL HAVE A GOOD FAITH BASIS FOR THE
15 FACTS ALLEGED IN THE COMPLAINT BEFORE THE COMPLAINT WAS
16 ALLEGED.

17 THE QUESTION IS NOT CAN THEY GO ON ULTIMATELY TO FIND
18 FACTS AND EXPERTS WHO WILL SUPPORT THEIR CONTENTIONS.

19 THE COURT: I'M NOT -- I'M NOT -- IF YOUR CONTENTION
20 NOW AFTER HAVING HEARD ME TALK ABOUT THIS IS THAT YOU WANT TO
21 CONDUCT DISCOVERY INTO THE EXISTENCE OF THE MYTHICAL EXPERT TO
22 SEE WHETHER THERE WAS A RULE 11 BASIS FOR BRINGING THIS CASE IN
23 THE FIRST PLACE.

24 MS. SIMONSEN: YOUR HONOR, THAT'S NOT -- THAT'S NOT
25 MY ARGUMENT. I DID --

1 THE COURT: OH, I THOUGHT IT WAS A PRETTY GOOD ONE.
2 OKAY.

3 MS. SIMONSEN: AS I DID NOTE, RULE 11 IS ONE OF THE
4 ANIMATING PRINCIPLES BEHIND A DEFENDANT'S ENTITLEMENT TO
5 DISCLOSURE OF THE ALLEGATIONS OF THE COMPLAINT, WHICH INCLUDE
6 AN EXPERT'S CONCLUSIONS ONCE THEY ARE PLACED AT ISSUE IN THE
7 COMPLAINT.

8 YOUR HONOR, ONCE A CONSULTING EXPERT -- AND I PUT
9 CONSULTING IN QUOTATION MARKS -- ONCE THAT EXPERT'S OPINIONS
10 ARE PUT FORTH IN A PLEADING AND REFERENCED IN ARGUMENTS IN A
11 CASE, THEY ARE NO LONGER A CONSULTING EXPERT. THEY ARE NO
12 LONGER AN EXPERT WHO BEHIND THE SCENES THE PLAINTIFF IS WORKING
13 WITH TO DEVELOP THEIR CASE. THEY HAVE BECOME AN EXPERT THAT
14 THE PLAINTIFF IS RELYING ON IN A CASE.

15 AND ALTHOUGH THE PLAINTIFF MAY GO ON TO HIRE A
16 DIFFERENT EXPERT, AND CERTAINLY WE'RE ENTITLED TO DISCOVERY ON
17 THAT EXPERT, IT DOESN'T CHANGE THE FACT THAT THEY'VE EXPRESSLY
18 RELIED ON A DIFFERENT PERSON'S OPINIONS AND CONCLUSIONS TO
19 BRING THEIR CLAIMS IN THE FIRST PLACE.

20 THE COURT: TWO PROBLEMS.

21 ONE, I REALLY DON'T THINK THERE'S A MATERIAL
22 DIFFERENCE BETWEEN PLAINTIFF PLEADING THE BOXES WERE IMPROPERLY
23 FILLED AS OPPOSED TO ACCORDING TO OUR EXPERT, COMMA, THE BOXES
24 WEREN'T PROPERLY FILLED. THEY'VE EITHER PLED IT OR THEY
25 HAVEN'T. AND PLEADING YOUR EVIDENCE OR PLEADING NONEVIDENCE

1 REALLY DOESN'T APPEAR TO OPEN THE DOOR TO DISCOVERY.

2 SECONDLY, THE ARGUMENT YOU JUST PRESENTED TO ME IS
3 ENTIRELY UNSUPPORTED BY THE LAW THAT YOU CITED.

4 I'M INCLINED TO DENY THE MOTION.

5 AND I THINK A RULE 37(A)(5) FEE SHIFT IS IN THE
6 CARDS. I'LL ISSUE PARAMETERS FOR THOSE SUBMISSIONS IN THE
7 ORDER WHEN IT GOES OUT LATER TODAY.

8 ALL RIGHT?

9 MS. SIMONSEN: THANK YOU, YOUR HONOR.

10 MR. CLARKSON: THANK YOU, YOUR HONOR.

11 THE COURT: THANK YOU.

12 (PROCEEDINGS CONCLUDED 9:56 A.M.)
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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

/S/ DOROTHY BABYKIN

1/17/18

FEDERALLY CERTIFIED TRANSCRIBER
DOROTHY BABYKIN

DATED